Supreme Court, U.S.
FILED

00-203 AUG 0 8 2000

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CLEVELAND INDIANS BASEBALL COMPANY, A LIMITED PARTNERSHIP

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SETH P. WAXMAN
Solicitor General
Counsel of Record

PAULA M. JUNGHANS
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

KENT L. JONES
Assistant to the Solicitor General

KENNETH L. GREENE
ROBERT W. METZLER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether, for purposes of the Federal Insurance Contributions Act, 26 U.S.C. 3101-3128, and the Federal Unemployment Tax Act, 26 U.S.C. 3301-3311, an award of back wages should be attributed to the year the award was actually paid or, instead, to the year that the events occurred that gave rise to the award.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions and regulations involved	2
Statement	2
Reasons for granting the petition	8
Conclusion	24
Appendix A	1a
Appendix B	6a
Appendix C	12a
Appendix D	14a

TABLE OF AUTHORITIES

Cases:

Atlantic Mutual Ins. Co. v. *Commissioner*, 523 U.S. 382 (1998)	14
Bowman v. *United States*, 824 F.2d 528 (6th Cir. 1987)	7, 17, 18, 19, 20, 22
Cottage Savings Ass'n v. *Commissioner*, 499 U.S. 554 (1991)	14
Flemming v. *Nestor*, 363 U.S. 603 (1960)	17
Freedomland, Inc., In re, 480 F.2d 184 (2d Cir. 1973), aff'd *sub nom. Otte* v. *United States*, 419 U.S. 43 (1974)	20, 21
Hemelt v. *United States*, 122 F.3d 204 (4th Cir. 1997)	18, 19
Johnston v. *Harris County Flood Control District*, 869 F.2d 1565 (5th Cir. 1989), cert. denied, 493 U.S. 1019 (1990)	18
Mazur v. *Commissioner*, 986 F. Supp. 752 (W.D.N.Y. 1997)	19
National Muffler Dealers Ass'n v. *United States*, 440 U.S. 472 (1979)	14

Cases—Continued: Page

San Francisco Baseball Assocs. L.P. Francisco Giants v. *United States*, 88 F. Supp.2d 1087 (N.D. Cal. 2000), cross-appeals pending, Nos. 00-15750 & 00-15890 (9th Cir.) 18, 23
Social Security Board v. *Nierotko*, 327 U.S. 358 (1946) 15, 16, 17
Walker v. *United States*, 202 F.3d 1290 (10th Cir. 2000) 19, 20

Statutes and regulations:

Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 502, 88 Stat. 829 18
Employment Security Amendments of 1970, Pub. L. No. 91-373, § 302, 84 Stat. 713 14
Internal Revenue Code (26 U.S.C.):
§ 104(a)(2) 19
§ 1401 19
§ 3101 ..... 2, 12, 14a
§ 3101(a) 3, 4, 21, 14a
§ 3101(b) 3, 4, 14a
§ 3102 5
§ 3102(a) 20
§ 3111 ..... 2, 12, 16a
§ 3111(a) 3, 4, 8, 16a
§ 3111(b) 3, 4, 8, 16a
§ 3121 ..... 2, 18a
§ 3121(a) 4, 5, 10, 12, 13, 18a
§ 3121(a) 4
§ 3121(a)(1) 4, 18a
§ 3121(v)(2) 8
§ 3301 ..... 2, 4, 5, 8, 12, 20a
§ 3301 5
§ 3301(a) 8
§ 3306 ..... 2, 12, 21a
§ 3306(b) 5, 10, 21a
§ 3402 5

Statutes and regulations: Page

§ 3402(a) 21
Social Security Act, ch. 531, 49 Stat. 620:
§ 210(a), 49 Stat. 625 15
§ 210(b), 49 Stat. 625 15
§ 801, 49 Stat. 636-637 9
§ 804, 49 Stat. 636-637 9
§ 811(a), 49 Stat. 639 10
§ 901, 49 Stat. 639 10
§ 907(b), 49 Stat. 642 10
Social Security Act Amendments of 1939, ch. 666, 53 Stat. 1360:
§ 601, 53 Stat. 1382 9
§ 604, 53 Stat. 1383 9
§ 608, 53 Stat. 1387 9-10
§ 614, 53 Stat. 1392-1393 10
Social Security Act Amendments of 1946, ch. 951, 60 Stat. 978:
§ 412(a), 60 Stat. 989 10
§ 412(b), 60 Stat. 989 10
§ 414(a)(3), 60 Stat. 991 16
Social Security Act Amendments of 1972, Pub. L. No. 92-336, § 200(b)(1), 86 Stat. 416 (§ 230, 42 U.S.C. 430) 4
Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 271(a), 96 Stat. 554 13
Unemployment Compensatoin Amendments of 1976, Pub. L. No. 94-566, § 211(a), 90 Stat. 2676 13-14
20 C.F.R. 404.1242 16
26 C.F.R.:
Section 31.3101-2(c) & Example 2, 12, 22a
Section 31.3101-3 ..... 2, 12, 22a
Section 31.3111-2 ..... 2, 22a
Section 31.3111-2(c) 2, 12, 22a
Section 31.3111-3 ..... 2, 12, 23a

Regulations—Continued: Page

Section 31.3121(a)-2 ..... 2, 23a
Section 31.3121(a)-2(a) 12-13, 19, 23a
Section 31.3121(a)(1)-1(a)(2) 2, 13, 24a
Section 31.3301-2 ..... 2, 13, 23a
Section 31.3301-3(b) 13
Section 31.3306(b)(1)-1 ..... 2, 24a
Section 31.3306(b)(1)-1(a)(1) 13, 24a
Section 31.3306(b)(1)-1(a)(2) 14, 25a
Treas. Reg. 106, § 402.228(a) (as amended by T.D. 5566, 1947-2 C.B. 148) 12
Treas. Reg. 106 (1940):
§ 402.301 12
§ 402.302 12
§ 402.303 12
§ 402.401 12
§ 402.402 12
§ 402.403 12
Treas. Reg. 107, § 403.228(a), as amended by T.D. 5566, 1947-2 C.B. 148 12

Miscellaneous:

AOD 1988-006, 1988 WL 570743 (IRS) (May 6, 1988) 22
50 Fed. Reg. 45,559 (1985) 4
51 Fed. Reg. 40,257 (1986) 4
58 Fed. Reg. 58,005 (1993) 4
K. Gideon, *Lawsuits and Settlements* (1995) 17-18
http//www.eeoc.gov/stats.charges.html 22
H.R. Rep. No. 728, 76th Cong., 1st Sess. (1939) 9, 10
H.R. Rep. No. 2447, 79th Cong., 2d Sess. (1946) 11, 16
Rev. Rul. 55-203, 1955-1 C.B. 114 13
Rev. Rul. 57-92, 1957-1 C.B. 306 13
Rev. Rul. 78-336, 1978-2 C.B. 255 13
Rev. Rul. 89-35, 1989-1 C.B. 280 ..... 13, 22
S. Rep. No. 734, 76th Cong., 1st Sess. (1939) 9, 10
S. Rep. No. 1862, 79th Cong., 2d Sess. (1946) 11, 16

Miscellaneous—Continued: Page

Statistics Division, Administrative Office of the United States Courts, *Judicial Business of the United States Courts: 1999 Annual Report of the Director* (2000) 22
SSA, Dep't of Health and Human Servs., SSR 83-7, 1981-1999 Soc. Sec. Rep. Ser. 18 (1983) 16-17
SSA, *Reporting Back Pay and Special Wage Payments to the Soc. Sec. Admin.*, Pub. No. 957 (Sept. 1997) 16-17
T.D. 6516, 25 Fed. Reg. 13,032 (1960) 12

In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, PETITIONER

v.

CLEVELAND INDIANS BASEBALL COMPANY,
A LIMITED PARTNERSHIP

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals (App., *infra*, 1a-6a) and the district court (App., *infra*, 7a-12a) are unreported.

JURISDICTION

The judgment of the court of appeals was filed on May 10, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The relevant portions of Sections 3101, 3111, 3121, 3301, and 3306 of the Internal Revenue Code, 26 U.S.C. 3101, 3111, 3121, 3301, and 3306, and of Sections 31.3101-2(c), 31.3101-3, 31.3111-2(c), 31.3111-3, 31.3121(a)-2, 31.3121(a)(1)-1(a)(2), 31.3301-2, and 31.3306(b)(1)-1 of the Treasury Regulations on Employment Taxes and Collection of Income Tax at Source, 26 C.F.R. 31.3101-2(c), 31.3101-3, 31.3111-2(c), 31.3111-3, 31.3121(a)-2, 31.3121(a)(1)-1(a)(2), 31.3301-2, and 31.3306(b)(1)-1, are set forth in the Appendix, *infra*, at 15a-26a.

STATEMENT

1. Respondent is one of the 26 major league baseball clubs that are parties to a collective bargaining agreement negotiated with the Major League Baseball Players Association. App., *infra*, 7a. The players association filed grievances claiming that, in 1986, 1987 and 1988, the clubs violated the free agency rights of the players under the collective bargaining agreement. *Id.* at 2a, 7a. An arbitration panel issued rulings in 1990 concluding that the clubs had interfered with the players' free agency rights and thereby depressed the players' salaries. To settle these grievances, the clubs agreed to pay $280 million into two accounts administered by a custodian for distribution to the players who had suffered damages. *Ibid.* The custodian was required to establish separate accounts for each of the clubs and, acting as agent for the clubs, was to deduct from the settlement payments any applicable federal income or employment taxes required to be withheld. C.A. App. 37, 90.

Under the agreed distribution plan, eight players who were employees of respondent during 1986, and fourteen players who were employees of respondent during 1987, received awards. The awards were paid in 1994. App., *infra*, 3a, 8a.[1] These payments aggregated $829,638 (including $219,638 denominated as interest) for violations of the collective bargaining agreement occurring in 1986 and $1,866,967 (including $409,119 denominated as interest) for violations occurring in 1987. *Id.* at 2a-3a, 8a; C.A. App. 11-12, 92.

As part of the Federal Insurance Contribution Act (FICA), Sections 3101(a) and (b) of the Internal Revenue Code "impose[] on the income of every individual" taxes to fund Social Security and Medicare "equal to [a percentage] of the wages (as defined in section 3121(a)) received by him with respect to employment." 26 U.S.C. 3101(a),(b). Similarly, Sections 3111(a) and (b) "impose[] on every employer" taxes to fund Social Security and Medicare "equal to [a percentage] of the wages (as defined in section 3121(a)) paid by him with respect to employment." 26 U.S.C. 3111(a), (b). For both employers and employees, the percentage of wages to be paid as the Social Security tax under Sections 3111(a) and 3101(a) was 5.7 percent in 1986 and 1987 and rose to 6.2 percent by 1994. 26 U.S.C. 3101(a), 3111(a). The percentage of wages paid by employers and employees as the Medicare tax under Sections

---

[1] One player who was not actually employed by respondent during 1987 also received an award in 1994 that was treated as attributable to 1987 under the settlement arrangement. The district court stated that this is because, even though "he was no longer in baseball in 1994, he was 'deemed' an employee of the last team to employ him—the Indians." App., *infra*, 8a n.1.

3101(b) and 3111(b) has been 1.45 percent since 1986. 26 U.S.C. 3101(b), 3111(b).

The term "wages" is defined for the purposes of the Social Security tax provisions (Sections 3101(a) and 3111(a)) to mean "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash," with certain exceptions. 26 U.S.C. 3121(a). As relevant here, wages do *not* include "that part of the remuneration which, after remuneration * * * equal to the contribution and benefit base (as determined under section 230 of the Social Security Act) with respect to employment has been paid to an individual by an employer during the calendar year with respect to which such contribution and benefit base is effective, is paid to such individual by such employer during such calendar year." 26 U.S.C. 3121(a)(1).[2] This definition of wages also applied for purposes of Sections 3101(b) and 3111(b) in 1986 and 1987. 26 U.S.C. 3121(a) (1988). By 1994, however, when the settlement award payments were made in this case, "wages" had been defined so that the exclusion for amounts in excess of the contribution and benefit base no longer applied for purposes of the Medicare tax provisions (Sections 3101(b) and 3111(b)). See 26 U.S.C. 3121(a)(1).

In addition, as part of the Federal Unemployment Tax Act (FUTA), Section 3301 of the Internal Revenue Code "impose[s] on every employer * * * for each

[2] The contribution and benefit base is a fixed dollar amount for a particular year determined under the formula contained in Section 230 of the Social Security Act, 42 U.S.C. 430. In 1994, the base was $60,600. 58 Fed.Reg. 58,005 (1993). In 1986, the base was $42,000. 50 Fed.Reg. 45,559 (1985). In 1987, it was $43,800. 51 Fed.Reg. 40,257 (1986).

calendar year an excise tax * * * equal to * * * [a percentage] of the total wages * * * paid by him during the calendar year with respect to employment * * * ." 26 U.S.C. 3301. The percentage of wages constituting this tax was 6.0 percent in 1986 and 1987 (26 U.S.C. 3301 (1982)) and rose to 6.2 percent by 1994. 26 U.S.C. 3301. The term "wages" is defined for purposes of Section 3301 in the same manner as in Section 3121(a), except "wages" for unemployment tax purposes do not include "remuneration * * * after remuneration * * * equal to $7,000 with respect to employment has been paid to an individual by an employer during any calendar year * * * ." 26 U.S.C. 3306(b).

2. When the amounts awarded to respondent's players were paid in 1994, FICA and income taxes were withheld from the amounts paid.[3] Respondent thereafter filed an employment tax return for the first quarter of 1994. That return reported employer and employee FICA taxes attributable to the settlement payments based on the entire amount of the awards made in 1994 and using the rates and annual ceilings on wages in effect for the 1994 year. App., *infra*, 2a-3a, 7a-8a; C.A. App. 13, 28, 92-93. Respondent also filed a return for the calendar year 1994 that reported the FUTA taxes attributable to the settlement payments based on the entire amount of the awards made in 1994 and using the rates and annual ceilings on wages in effect for the 1994 year. App., *infra*, 2a-3a, 7a-8a. Having remitted the withheld taxes, respondent then filed a claim for refund that sought to recover both the

[3] Under 26 U.S.C. 3102, 3402, employers are generally required to withhold from the wages of their employees the employee's share of the FICA tax and income taxes.

employer's share of the FICA and FUTA taxes it paid *and* the FICA taxes withheld from several employees who consented to join in the claim. C.A. App. 93. When the claim for refund was not granted within six months, respondent filed this tax refund suit in district court to recover the employer's share of the FICA taxes and the FUTA taxes that it paid. App., *infra*, 3a, 8a.[4]

Respondent raised several claims. First, that a portion of the award paid in 1994 was "interest," which is not subject to employment tax. Second, that the non-interest portion of the award paid in 1994 did not constitute "wages" within the meaning of the employment tax statutes. And, third, that, if any portion of the award paid in 1994 constituted "wages," it should be attributed to 1986 or 1987 (when the annual wage ceiling had been exceeded for the affected players) rather than to 1994, when the awards were paid. As a result, respondent claimed that no FICA or FUTA taxes were due from the 1994 awards. App., *infra*, 3a.

The parties stipulated (i) that the "interest" portion of the awards paid in 1994 did not constitute "wages" and (ii) that the remainder of the awards constituted back wages for the years 1986 and 1987. App., *infra*, 3a-4a. The parties then filed cross-motions for summary judgment that presented a single issue—whether, for FICA and FUTA tax purposes, the back wages paid by respondent are attributable to 1994, the year in which they were paid, or to 1986 and 1987, the years in which they would have been earned but for respondent's breach of the collective bargaining agreement. *Id.* at 4a.

---

[4] In this suit, respondent does not seek to recover the employee share of the FICA taxes. C.A. App. 1-18.

The government acknowledged in its brief to the district court that the prior decision of the Sixth Circuit in *Bowman* v. *United States*, 824 F.2d 528, 530 (1987), was controlling precedent on this issue in that court. In *Bowman*, the Sixth Circuit held that, for FICA tax purposes, "[a] settlement for back wages should not be allocated to the period when the employer finally pays but should be allocated to the periods when the regular wages were not paid as usual." *Id.* at 530 (internal quotation marks and citation omitted). Because other circuits have disagreed with the reasoning and holding of *Bowman*, however, the government's brief explained to the district court that the government desired to preserve that issue for appeal. App., *infra*, 10a. Acknowledging that "at least one court has disagreed with *Bowman*," the district court concluded that judgment in favor of respondent was "dictated" by the Sixth Circuit precedent that was controlling in that court. *Id.* at 10a-11a.

3. The government appealed and filed a petition for hearing en banc in view of the circuit conflict. The court of appeals denied the petition for en banc review and referred the case to a panel of the court. App., *infra*, 4a.

The panel affirmed. App., *infra*, 1a-5a. The panel noted that the government argued that the plain language of the FICA and FUTA statutes, the legislative history of those provisions, and the Treasury Regulations all demonstrate that *Bowman* was incorrectly decided and that "the government cites cases from our sister circuits that are at odds with our *Bowman* holding." *Id.* at 5a. The panel stated, however, that it was not required to address the merits of the government's contentions because, "[e]ven if we were

persuaded by the government's argument, we are bound by the *Bowman* decision." *Ibid.*

REASONS FOR GRANTING THE PETITION

This case presents a frequently recurring question regarding the proper treatment of back wages under the FICA and FUTA taxes. Due to the large volume of employment claims that can yield back wage awards under both federal and state laws, the resolution of the question presented in this case affects numerous employers and employees each year. Moreover, as the court of appeals acknowledged, cases in other circuits "are at odds with" the decision in this case (App., *infra*, 5a). Review by this Court is needed to resolve the disparate treatment thus afforded throughout the Nation to employers and employees under these conflicting decisions.

1. a. The court of appeals erred in holding that disbursements of back wages should be allocated for FICA and FUTA tax purposes to the years in which the wages were earned or should have been paid rather than to the year in which they actually were paid. Sections 3111(a) and (b) of the Internal Revenue Code impose the FICA taxes that fund Social Security and Medicare on "wages * * * paid" during the calendar year and Section 3301(a) imposes the FUTA tax on "wages * * * paid * * * during the calendar year." No exception to this express statutory rule is created for back wages.[5] Under the plain language of these

[5] Cf. 26 U.S.C. 3121(v)(2) (creating a special timing rule for compensation attributable to certain nonqualified deferred compensation plans).

statutes, the back wages are taxed in the year in which they are paid and *not* in the year in which the services were performed or would have been performed but for the wrongful conduct of the employer.

The legislative history of the pertinent statutory provisions shows that Congress specifically intended wages to be taken into account in the year that they are paid, regardless of when earned or when owed by the employer. As originally enacted in 1935, the Social Security Act provided that FICA tax rates, which gradually increased over the period from 1937 through 1948, applied "[w]ith respect to employment during the calendar year[]." Social Security Act, ch. 531, §§ 801, 804, 49 Stat. 636-637. In 1939, however, Congress amended FICA to provide that the rate of tax would no longer be applied on the basis of when the services were performed but would instead be applied "[w]ith respect to wages *received* during the calendar year[]" in the case of the employee (Social Security Act Amendments of 1939, ch. 666, § 601, 53 Stat. 1382 (emphasis added)) and "[w]ith respect to wages *paid* during the calendar year[]" in the case of the employer (Social Security Act Amendments of 1939, ch. 666, § 604, 53 Stat. 1383 (emphasis added)). The Report of the Committee on Ways and Means explains that, prior to the amendment, the statute "provide[d] that the rate of tax applicable to wages is the rate in effect at the time of the performance of the services for which the wages are paid" but that "[u]nder the amendment *the rate applicable would be the rate in effect at the time that the wages are paid and received without reference to the rate which was in effect at the time the services were performed.*" H.R. Rep. No. 728, 76th Cong., 1st Sess. 57-58 (1939) (emphasis added). See also S. Rep. No. 734, 76th Cong., 1st Sess. 70-71 (1939). A corre-

sponding change was also made to the provision of the FUTA that specified how its tax rate was applied. Social Security Act Amendments of 1939, ch. 666, § 608, 53 Stat. 1387. In adopting the new rule, Congress emphasized that, "[w]ith both the old-age-insurance tax [FICA] and the unemployment compensation tax [FUTA] on the wages paid basis, the keeping of records by employers will be simplified." S. Rep. No. 734, *supra*, at 75-76; H.R. Rep. No. 728, *supra*, at 62-63.

The legislative history of similar changes in the provisions that place an annual ceiling on wages subject to FICA and FUTA tax (currently in 26 U.S.C. 3121(a) and 3306(b)) also reflects the clear intent of Congress that the FICA and FUTA taxes are to be determined on a wages-paid basis. Prior to the Social Security Act Amendments of 1946, ch. 951, 60 Stat. 978, the Social Security Act had allocated wages to the year in which services were performed in applying the maximum wage base for FICA and FUTA tax purposes.[6] In 1946, Congress amended the annual ceiling provisions to change the basis upon which the ceiling was measured from one that looked to *services performed* during the year to one that looked to *wages paid* during the year. Social Security Act Amendments of 1946, ch. 951, §§ 412(a), (b), 60 Stat. 989. The reports of the Senate Finance Committee and the House Committee on Ways

[6] As originally enacted in 1935, the Social Security Act included an annual wage ceiling for the FICA tax, but did not include one for the FUTA tax. Social Security Act, ch. 531, §§ 811(a), 901, 907(b), 49 Stat. 639, 642. In 1939, Congress amended the definition of wages for FUTA tax purposes to include an annual wage ceiling that tracked the annual wage ceiling applicable to FICA, which at that time allocated wages to the year in which services were performed in applying the maximum wage base. Social Security Act Amendments of 1939, ch. 666, § 614, 53 Stat. 1392-1393.

and Means explained that, "[u]nder the definition of the term contained in existing law there is excluded from 'wages', for [FICA and FUTA tax] purposes, all remuneration with respect to employment during any calendar year paid to an individual by an employer (irrespective of the year of payment) after remuneration equal to $3,000 has been paid to such individual by such employer with respect to employment during such year." S. Rep. No. 1862, 79th Cong., 2d Sess. 35 (1946); H.R. Rep. No. 2447, 79th Cong., 2d Sess. 35 (1946). These reports further explained that the new legislation "amends such definitions, effective January 1, 1947, to constitute as the yardstick the *amount paid* during the calendar year (with respect to employment to which the taxes under the code are applicable), *without regard to the year in which the employment occurred.*" S. Rep. No. 1862, *supra*, at 35 (emphasis added); H.R. Rep. No. 2447, *supra*, at 35 (emphasis added). The reports concluded that, "in applying the $3,000 limitation on wages, the employer, employee, and those administering the taxes, may, beginning with the calendar year 1947, look only to the amount of remuneration paid by the employer to the employee during the calendar year, and exclude all remuneration paid during the calendar year after $3,000 has been paid during the year with respect to * * * the employment with respect to which the taxes imposed by * * * the Federal Insurance Contributions Act are applicable[.]" S. Rep. No. 1862, *supra*, at 36; H.R. Rep. No. 2447, *supra*, at 35.[7]

[7] After the changes enacted in the 1946 Amendments, the FICA and FUTA tax provisions were recodified in the Internal Revenue Code of 1954 and given their current section numbers. Although the applicable tax rates and the amounts of the annual

Consistent with the language of these statutes and their legislative history, Treasury Regulations have long specified that the relevant year for determining the FICA tax is the year in which the wages are paid or received.[8] These regulations specify that "[t]he employee tax attaches at the time that the wages are received by the employee" (26 C.F.R. 31.3101-3) and that "[t]he employee tax is computed by applying to the wages received by the employee the rate in effect at the time such wages are received" rather than during "the year in which the services were performed" (26 C.F.R. 31.3101-2(c) & Example). The regulations further provide that "[t]he employer tax attaches at the time that the wages are paid by the employer" (26 C.F.R. 31.3111-3) and that "[t]he employer tax is computed by applying to the wages paid by the employer the rate in effect at the time such wages are paid" (26 C.F.R. 31.3111-2(c)).[9] The regulations that interpret the statu-

---

wage ceilings have changed since the enactment of the 1954 Code, as relevant here, the FICA and FUTA provisions involved in this case have remained substantially the same since 1946. See 26 U.S.C. 3101, 3111, 3121(a), 3301, 3306.

[8] In 1960, the Treasury Regulations governing FICA and FUTA were consolidated and republished with their current section numbers. T.D. 6516, 25 Fed. Reg. 13,032 (1960). The substance of these regulations traces back to earlier promulgations. See Treas. Reg. 107, § 403.228(a) (as amended by T.D. 5566, 1947-2 C.B. 148); Treas. Reg. 106, § 402.228(a) (as amended by T.D. 5566, 1947-2 C.B. 148); Treas. Reg. 106, §§ 402.301, 402.302, 402.303, 402.401, 402.402, 402.403 (1940).

[9] As to when wages are paid and received, Treasury regulations provide that "[i]n general, wages are received by an employee at the time that they are paid by the employer to the employee. Wages are paid by an employer at the time that they are actually or constructively paid unless under paragraph (c) of this section [which concerns specified types of minor cash pay-

tory annual ceiling on wages subject to FICA (26 U.S.C. 3121(a)) further provide that this limitation "relates to the amount of remuneration received during any 1 calendar year for employment after 1936 and not to the amount of remuneration for employment performed in any 1 calendar year." 26 C.F.R. 31.3121(a)(1)-1(a)(2). Applying the plain language of these statutes and regulations, the Treasury has consistently taken the position that back wages are to be taken into account for FICA purposes in the year they are actually paid. Rev. Rul. 55-203, 1955-1 C.B. 114; Rev. Rul. 89-35, 1989-1 C.B. 280. See also Rev. Rul. 57-92, 1957-1 C.B. 306; Rev. Rul. 78-336, 1978-2 C.B. 255.

The Treasury Regulations that interpret FUTA are to the same effect. The FUTA regulations state that "[t]he tax for any calendar year is measured by the amount of wages paid by the employer during such year" (26 C.F.R. 31.3301-2) and that "[t]he tax is computed by applying to the wages paid in a calendar year * * * the rate in effect at the time the wages are paid" (26 C.F.R. 31.3301-3(b)). The FUTA regulations addressing the annual wage ceiling similarly provide that "the term 'wages' does not include that part of the remuneration paid within any calendar year by an employer to an employee which exceeds the first $3,000 of remuneration * * * paid within such calendar year by such employer to such employee for employment performed for him at any time after 1938." 26 C.F.R. 31.3306(b)(1)-1(a)(1).[10] In addition, the regulations

---

ments that are not involved in this case] they are deemed to be subsequently paid." 26 C.F.R. 31.3121(a)-2(a).

[10] Since these regulations were issued, the annual wage ceiling has been raised to $7,000. See Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 271(a), 96 Stat. 554; Unem-

addressing the annual wage ceiling expressly provide that the ceiling applies "to the amount of remuneration paid during any one calendar year for employment * * * and not to the amount of remuneration for employment performed in any one calendar year." 26 C.F.R. 31.3306(b)(1)-1(a)(2).

b. It is well established that "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law." *Cottage Savings Ass'n* v. *Commissioner*, 499 U.S. 554, 561 (1991) (internal quotation marks and citations omitted); see also *Atlantic Mutual Ins. Co.* v. *Commissioner*, 523 U.S. 382, 389 (1998); *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 488 (1979).

In the present case, the court of appeals did not address the agency's consistent interpretation of these controlling statutory provisions. Nor did the court provide any analysis or discussion of the text of the statutes or their legislative history. Instead, the Sixth Circuit rejected the government's position solely on the basis of that court's prior decision in *Bowman*. App., *infra*, 5a. In *Bowman*, however, the court had *also* failed to address the clear legislative history that demonstrates that, after 1946, Congress did not intend to allocate back wages to the year in which services were performed. The court similarly failed in *Bowman* to reconcile its holding with the plain language of the statutes and the applicable Treasury Regulations. Instead, in *Bowman*, the court of appeals based its hold-

---

ployment Compensation Amendments of 1976, Pub. L. No. 94-566, § 211(a), 90 Stat. 2676; Employment Security Amendments of 1970, Pub. L. No. 91-373, § 302, 84 Stat. § 713.

ing that back wages are to be allocated to the years in which services were performed, rather than to the year in which the back wages were paid, solely on the theory that that result is required by the decision of this Court in *Social Security Board* v. *Nierotko*, 327 U.S. 358 (1946). See 824 F.2d at 530.

The *Nierotko* case involved an application of the Social Security Act provisions that predated the changes made to these statutes by Congress in 1946. In *Nierotko*, an employee was awarded back pay under the National Labor Relations Act for the period from February 2, 1937, to September 25, 1939, for a wrongful discharge due to his union activities. The back pay was paid on July 18, 1941. The principal issue for decision was whether that back pay was to be treated as "wages" in determining the employee's entitlement to benefits under the Social Security Act of 1935. The Court first concluded that back pay constitutes "wages" for purposes of the Act. 327 U.S. at 360-370. The Court then stated that, "[i]f, as we have held above, 'back pay' is to be treated as wages, we have no doubt that it should be allocated to the periods when the regular wages were not paid as usual." *Id.* at 370.

The *Nierotko* case was decided under the original provisions of the Social Security Act of 1935 that defined "wages" as "remuneration for employment," subject to a $3,000 wage ceiling "with respect to employment during any calendar year." Social Security Act of 1935, ch. 531, § 210(a), 49 Stat. 625. See 327 U.S. at 360. The term "employment" was further defined in that Act as "any service * * * performed * * * by an employee for his employer." Social Security Act of 1935, § 210(b), 49 Stat. 625. The statute applied in *Nierotko* thus used services performed, rather than payments received, to

define the annual wage ceiling for benefit purposes. See pages 9-10, *supra*.

In 1946, however, Congress amended the Social Security Act to change the annual "wage" ceiling for benefit purposes. For "remuneration * * * with respect to employment * * * paid to an individual during any calendar year *after 1946*," the annual wage ceiling was based upon "remuneration * * * *paid* to such individual during such calendar year." Social Security Act Amendments of 1946, Pub. L. No. 79-719, § 414(a)(3), 60 Stat. 991 (emphasis added). The legislative reports for the 1946 Act plainly state that the annual wage ceiling for benefit computation purposes (and for FICA and FUTA tax purposes) was thereafter to be determined based upon the date of payment and "without regard to the year in which the employment occurred." S. Rep. No. 1862, *supra*, at 35, 37; H.R. Rep. No. 2447, *supra*, at 35-36. The statutory scheme considered in *Nierotko* thus obviously differed in this precise critical respect from the statutory provisions that have been in effect since 1946—the provisions that are involved in this case.[11]

---

[11] In a program policy statement, the Social Security Administration (SSA) has indicated that, for benefit computation purposes, it will continue to apply the *Nierotko* rule to one particular type of back wages—"back pay under a statute." SSA, Dep't of Health and Human Servs., SSR 83-7, 1981-1991 Soc. Sec. Rep. Ser. 18 (1983); see also 20 C.F.R. 404.1242. This policy statement applies only for benefit computation purposes; it does not apply for tax purposes. SSA, *Reporting Back Pay and Special Wage Payments to the Soc. Sec. Admin.*, Pub. No. 957 (Sept. 1997), at 1. ("The Social Security Administration (SSA) has special rules for back pay * * * for social security coverage and benefit purposes only."). Indeed, the SSA has noted that, under the rule that applies for tax purposes under the Social Security Act, "employers are liable for Federal Insurance Contribution Act tax payments on back pay on the basis of when the payment is made * * *." SSR 83-7, at *1; accord Pub. No. 957, *supra*, at 2.

Moreover, as the Sixth Circuit acknowledged in the *Bowman* case, the decision in *Nierotko* "is factually distinguishable from the present case" because it "involved back wages in the benefits context as opposed to the taxation context." 824 F.2d at 530. The considerations relevant for benefits purposes are not necessarily the same as those for tax purposes. As this Court observed in *Flemming* v. *Nestor*, 363 U.S. 603, 609 (1960), "eligibility for benefits, and the amount of such benefits, do not in any true sense depend on contribution to the program through the payment of taxes, but rather on the earnings record of the primary beneficiary." See also note 11, *supra*. In determining an employee's eligibility for benefits, and the amount thereof, an allocation of an award of back wages to the periods of employment to which such back wages relate may be consistent with the policy of providing security to employees in retirement. Absent such an allocation, an employee may not obtain credit for a sufficient number of quarters to allow him to collect benefits and the amount of benefits awarded may similarly be affected.

No similar policy considerations are at stake in the tax context. Indeed, taxing back wages in the year actually paid does not routinely result in additional FICA and FUTA tax liability, even though it appears to do so in this particular case. To the contrary, in the common situation in which, during the year of payment (as opposed to the year to which such back wages could be attributed), the employee had already reached the maximum wage limit, *less* tax would be owed when the back wages are taxed in the year paid. As one

commentator has pointed out, "[t]he *Bowman* case will seldom provide an advantageous result for current [taxpayers]." K. Gideon, *Lawsuits and Settlements* § 1101.4, at 262 (1995). Moreover, because of the complexities of restating tax liabilities for cash basis taxpayers from the year of payment to former periods of time, "*Bowman* is not only expensive for most taxpayers, it also imposes substantial administrative burdens on the IRS." *Id.* at 263 n.42.

2. The court of appeals correctly noted in this case that decisions in other circuits "are at odds with [its] *Bowman* holding" (App., *infra*, 5a).[12] For example, in *Hemelt* v. *United States*, 122 F.3d 204 (4th Cir. 1997), the taxpayers had received a payment in settlement of a class action suit under Section 502 of the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829. The ERISA suit had alleged that the taxpayers' employer had improperly fired them to prevent them from qualifying for pension benefits. The taxpayers contended that the settlement payment they received from the ERISA case did not represent "wages" subject to the FICA tax and further contended, relying on the Sixth Circuit's decision in *Bowman* (Appellant's Br. 46), that, even if the payment constituted "wages," it must be allocated to the years the wages would have been earned instead of to the year the payment was received. 122 F.3d at 210. The Fourth Circuit first concluded that the settlement

[12] The decision in *Bowman* has been cited favorably in dictum in *Johnston* v. *Harris County Flood Control District*, 869 F.2d 1565, 1580 (5th Cir. 1989), cert. denied, 493 U.S. 1019 (1990), and has been followed by a district court in another circuit. *San Francisco Baseball Associates L.P* v. *United States*, 88 F. Supp.2d 1087, 1094-1095 (N.D. Cal. 2000), cross-appeals pending, Nos. 00-15750 & 00-15890 (9th Cir).

payment represented back pay for a wrongful termination of employment and therefore constituted "wages" for purposes of the FICA tax. *Id.* at 209-210. The court then held that the taxpayer's reliance on the *Bowman* decision was "meritless." *Id.* at 210.[13] Without discussing the *Bowman* opinion directly, the court rejected the reasoning of that decision because "[i]t is clear under the Treasury Regulations that 'wages' are to be taxed for FICA purposes in the year in which they are received." *Ibid.* (citing 26 C.F.R. 31.3121(a)-2(a)).[14] See also *Mazur* v. *Commissioner*, 986 F. Supp. 752, 755 (W.D.N.Y. 1997) (concluding that the Sixth Circuit erred in *Bowman* by failing to defer to the long-standing Treasury Regulations); page 13, *supra*.

In *Walker* v. *United States*, 202 F.3d 1290 (2000), the Tenth Circuit also rejected the analysis and conclusion of the *Bowman* decision. In that case, in the years 1992 through 1995, a lawyer received a portion of a contingency fee payment owed in connection with an antitrust lawsuit that had been filed in 1972 and settled in 1975. The lawyer paid Self-Employment Contributions Act (SECA) taxes imposed under 26 U.S.C. 1401 on the amounts received. He then brought a refund suit, claiming that the amounts received during the years 1992 through 1995 should be allocated to the years in which the services were performed (1971

[13] The court of appeals further noted in the *Hemelt* case that the taxpayers had provided no evidence of how the court should allocate the award among the prior years and that the court therefore "could not undertake such allocation even if [it] were allowed to do so." 122 F.3d at 210-211.

[14] The court also rejected the taxpayer's additional claim that this settlement payment was excluded from the federal income tax under 26 U.S.C. 104(a)(2) as damages received on account of personal injury. See 122 F.3d at 209-210.

through 1975). In urging that claim, he relied on the decision of this Court in *Nierotko* and the decision of the Sixth Circuit in *Bowman*. For the reasons we have described (pages 15-16, *supra*), the Tenth Circuit found the decision in *Nierotko* "inapposite" and the decision in *Bowman* "unpersuasive." 202 F.3d at 1293. The Tenth Circuit, like the Fourth Circuit in *Hemelt*, relied significantly on the fact that the governing Treasury regulations specify that wages are subject to the tax when received, not when the services are rendered. *Id.* at 1292-1293.

The *Bowman* decision is also inconsistent in principle with *In re Freedomland, Inc.*, 480 F.2d 184 (2d Cir. 1973), aff'd *sub nom. Otte* v. *United States*, 419 U.S. 43 (1974). In that case, former employees of a bankrupt corporation filed wage claims for services performed prior to the filing of the bankruptcy petition. The district court held that the bankruptcy trustee was required to withhold federal income and employment taxes with respect to such claims. 419 U.S. at 46. The district court also held that the government was not required to file a proof of claim to recover the withheld taxes and that the government claim should be given fourth priority. *Id.* at 46-47. The court of appeals affirmed these holdings and rejected the trustee's assertion that requiring the trustee to withhold taxes would create an administrative "parade of horribles." 480 F.2d at 188. The court of appeals pointed out that most wage earners are on a cash basis and report their income taxes when their wages are received and that the "[w]ithholding of social security taxes is also done 'by deducting the amount of the tax from the wages *as and when paid.*'" *Id.* at 189 n.8 (quoting 26 U.S.C. 3102(a)). The court further noted that "[t]he taxes are by law calculable only when the wage claims are paid

and not until then." *Id.* at 190. The Second Circuit thus recognized that back pay is to be taken into account for FICA tax purposes in the year the payment is received, rather than the year for which the payment was owed.

This Court affirmed. 419 U.S. at 58. The Court first concluded that, although "the payments to the wage claimants [were] * * * made after the employment relationship terminated," they were still "wages" for purposes of income tax withholding (419 U.S. at 49) and that "[t]he situation is the same with respect to FICA withholding" (419 U.S. at 51). The Court then observed that "Section 3102(a) of the Internal Revenue Code, 26 U.S.C. § 3102(a), provides that the tax is to be collected by the employer by deducting 'from the wages as and when paid.'" 419 U.S. at 51. The Court therefore concluded that "the payments clearly are 'wages' under that statute, even though again, at the time of payment, the employment relationship between the bankrupt and the claimant no longer exists." *Ibid.* The Court stated that this conclusion was also supported by the long-standing regulations that "consistently have been to this effect." *Ibid.* The Court emphasized that the payments became subject to FICA tax when paid, rather than when earned, for "[l]iability for the taxes accrues only when the wage is paid." *Id.* at 55 (citing 26 U.S.C. 3402(a), 3101(a)). The Court explained that "[t]he wages that are the subject of the wage claims, although earned before bankruptcy, were not paid prior to bankruptcy. Freedomland [the debtor] had incurred no liability for the taxes. Liability came into being only during bankruptcy. The taxes do not partake, therefore, of the nature of debts of the bankrupt for which proofs of claim must be filed." 419 U.S. at 55. While neither the court of appeals nor this Court was faced in *In re Freedomland* with the precise question presented

in this case, the conclusion in that case that, under the plain text of these statutes, FICA tax liability arises at the time the wages are paid, rather than at the time the work to which the wage claim relates is performed, directly supports the government's position in this case.

3. The Internal Revenue Service has announced that it does not acquiesce in, and will not follow, the decision in *Bowman*. AOD 1988-006, 1988 WL 570743 (IRS) (May 6, 1988); Rev. Rul. 89-35, 1989-1 C.B. 280. In view of the conflict that exists among the circuits on the question presented in this case, employers that are subject to a judgment for back wages, or that enter into a settlement of a claim for back wages, lack adequate guidance as to how they should compute the FICA and FUTA taxes attributable to such payments. Moreover, either choice made by the employer is likely to generate controversy and result in litigation—instituted by the government if the *Bowman* rule is followed or by the employer or employee if the cases rejecting *Bowman* are followed.

Statistics compiled by the Director of the Administrative Office of the United States Courts show that over the five-year period from 1995 to 1999, more than 100,000 private civil rights cases involving employment claims were commenced in the federal district courts. Statistics Division, Administrative Office of the United States Courts, *Judicial Business of the United States Courts: 1999 Annual Report of the Director* 140 (2000). The Enforcement Statistics of the Equal Employment Opportunity Commission show that, in *each* of the years 1992 through 1999, more than 70,000 charges of unlawful employment practices were received.[15] While

[15] These statistics can be accessed on the internet at http//www.eeoc.gov/stats/charges.html.

many of these claims may not result in a judgment favorable to the claimant or a settlement in which back pay is paid, there are undoubtedly significant numbers of such claims that do. In addition, as the cases cited in this petition illustrate, awards of back wages also occur in ERISA and bankruptcy cases and many other settings.

Moreover, the specific context in which this case arose has already led to intensive litigation in the lower courts. Disputes over the tax treatment of the distributions from the collective bargaining settlement involved in this case have, to this date, already spawned eight other tax refund suits raising the *Bowman* issue. See *San Francisco Baseball Assocs. L.P* v. *United States*, 88 F. Supp. 2d 1087 (N.D. Cal. 2000), cross-appeals pending, Nos. 00-15750 & 00-15890 (9th Cir.); *The Minnesota Twins Partnership* v. *United States*, No. 00-CV-356ADM/AJB (D. Minn.); *The Boston Red Sox Baseball Club* v. *United States*, No. 00-CV-10312 (D. Mass.); *Kansas City Royals Baseball Corp.* v. *United States*, Nos. 00-0105-CV-W-3 (W.D. Mo.); *St. Louis Cardinals, L.P.* v. *United States*, No. 4:00-CV-00138-CAS (E.D. Mo.); *Baseball Club of Seattle, L.P.* v. *United States*, No. C99-2061-Z (W.D. Wash.); *San Diego Padres Baseball Partnership* v. *United States*, No. 99-CV-0828W (LSP) (S.D. Cal.); *The Phillies, a Pennsylvania Limited Partnership* v. *United States*, No. 99-CV-4054 (E.D. Pa.). This one single settlement agreement may lead to 17 additional suits if each of the remaining clubs chooses to litigate the issue.

The question presented in this case is thus manifestly a recurring issue of substantial importance in the administration of the tax laws. Resolution of this commonly recurring issue is needed to avoid continuing uncertainty and uneven application throughout the Nation

of these widely applicable FICA and FUTA tax provisions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
PAULA M. JUNGHANS
Acting Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
KENT L. JONES
Assistant to the Solicitor General
KENNETH L. GREENE
ROBERT W. METZLER
Attorneys

AUGUST 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 99-3410

CLEVELAND INDIANS BASEBALL COMPANY,
A LIMITED PARTNERSHIP, PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA,
DEFENDANT-APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

[Filed: May 10, 2000]

OPINION

Before: SUHRHEINRICH, COLE, Circuit Judges; and QUIST, District Judge.*

PER CURIAM. The United States appeals from the judgment of the district court in which the court found that an award of back wages is taxed for the purposes of the Federal Insurance Contribution Act (FICA), 26 U.S.C. §§ 3101-3128, and Federal Unemployment Tax

---

* The Honorable Gordon J. Quist, United States District Court for the Western District of Michigan, sitting by designation.

Act (FUTA), 26 U.S.C. §§ 3301-3311, in the year in which those wages were earned rather than the year in which the award of back wages was actually paid. For the following reasons, we AFFIRM the district court's judgment.

I.

The parties stipulated to the facts of this case before the district court, which we briefly summarize here. Major League Baseball Clubs (the "Clubs") and the Major League Baseball Players Association ("MLBPA") were involved in three separate grievances in 1990, wherein the MLBPA claimed that the Clubs breached the Collective Bargaining Agreement ("CBA") with respect to free agency rights of the baseball players in 1986, 1987 and 1988. After an arbitration panel issued a series of rulings adverse to the Clubs, the Clubs and the MLBPA settled their grievances on December 21, 1990. The settlement required the Clubs to contribute $280 million to a custodial account for distribution to affected players according to the MLBPA framework approved by the arbitration panel.

The Cleveland Indians Baseball Company's ("Indians") share of the settlement fund was $610,000 for the 1986 season and $1,457,848 for the 1987 season. The Indians received the funds in 1994 and distributed those funds to the affected players—eight players who were employed in 1986 and fifteen players who were employed in 1987. Unsure as to the tax treatment of these distributions, the Indians paid FICA and FUTA taxes on the total funds as if the payments were wages for services rendered in 1994. In other words, the Indians paid FICA and FUTA taxes on the funds as if

they were actually wages received by the players in 1994, the year of distribution. The Indians paid these tax obligations in April 1994 and January 1995. None of the affected players, however, performed services for the Indians in 1994 or 1995. The Indians filed this instant action seeking reimbursement of the FICA and FUTA taxes paid to the United States.

The Indians sought a refund of FICA and FUTA taxes claiming that, (1) a portion of the funds paid to the Indians and disbursed to its former players constituted non-taxable interest; and (2) the non-interest portion was not taxable because the funds were damages for the wrongful breach of the CBA and not wages for services rendered. Finally, even if the payments constituted wages for services rendered rather than interest and damages, the Indians argued that they should have paid taxes at the 1986 and 1987 tax rates applicable when the services were rendered. Because the 1986 and 1987 FICA and FUTA taxes of each of the affected players were already paid to the maximum required amount, the Indians asserted that they are entitled to a full refund if the payments were determined to be wages for services rendered in 1986 and 1987.

The government initially disputed the Indians's claims. Both parties eventually agreed, however, that $629,000 of the payments from the settlement fund to affected players constituted interest and were not subject to FICA and FUTA taxes. Thus, the Indians were entitled to a refund for taxes paid on the interest portion of the settlement. The parties also agreed that the remaining portion of the payments, approximately $2 million, constituted back-wage payments, earnings

that would have been paid in 1986 and 1987 but for the Clubs' breach of the CBA. The issue presented to this court is the tax year applicable to these back-wage payments made in 1994 for services rendered in the 1986 and 1987 baseball seasons.

In the district court, the government and the Indians agreed that our decision in *Bowman v. United States*, 824 F.2d 528 (6th Cir.1987) directly addressed this precise issue. The *Bowman* court held that "a settlement for back wages should not be allocated to the period when the employer finally pays but 'should be allocated to the periods when the regular wages were not paid as usual.'" 824 F.2d at 530 (quoting *Social Security Bd. v. Neirotko*, 327 U.S. 358, 370 (1946)). Following *Bowman*, the district court entered judgment in favor of the Indians and ordered the United States to refund the FICA and FUTA taxes paid on the settlement disbursements designated as back wages, including interest from the dates on which the payments were made.

The United States sought en banc reversal of the *Bowman* decision. This court declined the en banc petition and the case was referred to this panel.

II.

Typically, statutory interpretations such as those presented in this appeal are reviewed *de novo*. *See Williams v. Coyle*, 167 F.3d 1036, 1038 (6th Cir. 1999).

Here, our precedent clearly indicates that the statutory provision in question requires settlements for back wages to be allocated to the period in which they were earned or should have been paid, and not to the

period in which the back wages were actually disbursed. *See Bowman*, 824 F.2d at 530. The government contends that *Bowman* was wrongly decided, arguing that the plain language, legislative history and applicable FICA and FUTA Treasury Regulations demonstrate that back wages are subject to tax in the year in which payment is made and not in which the services were rendered. In addition, the government cites cases from our sister circuits that are at odds with our *Bowman* holding. Despite these arguments, the government "agrees with taxpayer that the issue presented in this case was decided in *Bowman*." Appellant Reply Br. at 1.

Even if we were persuaded by the government's argument, we are bound by the *Bowman* decision. It is firmly established that one panel of this court cannot overturn a decision of another panel; only the court sitting en banc can overturn such a decision. *See United States v. Smith*, 73 F.3d 1414, 1418 (6th Cir. 1996). "The earlier determination is binding authority unless a decision of the United States Supreme Court mandates modification or this Court sitting en banc overrules the prior decision." *United States. v. Moody*, 206 F.3d 609,—(6th Cir. 2000) (citing *Salmi v. Secretary of HHS*, 774 F.2d 685, 689 (6th Cir.1985)). Accordingly, following *Bowman*, we reject the government's argument and affirm the district court's judgment that FUTA and FICA taxes paid on the back wage disbursements should have been paid as if earned in 1986 and 1987.

III.

For the foregoing reasons, we **AFFIRM** the district court's judgment.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CHIO
EASTERN DIVISION

Case No. 1:96-CV-2240

CLEVELAND INDIANS BASEBALL CO., PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: Jan. 25, 1999]

MEMORANDUM & OPINION

By this action, the plaintiff, Cleveland Indians Baseball Company (the Indians), seeks a refund from the United States of taxes paid pursuant to the Federal Insurance Contribution Act (FICA) and the Federal Unemployment Tax Act (FUTA). Before the Court are the parties' Cross-Motions for Summary Judgment on Stipulated Facts. For the reasons briefly set forth below, the Indians' motion is GRANTED, the Government motion is DENIED and judgment is entered in favor of plaintiffs for a total of $97,202.20, plus interest.

I.

The FICA and FUTA taxes at issue were paid by the Indians in April 1994 and January 1995, respectively. The taxes were premised on payments made by the Indians in 1994 to certain of its former players, specifically eight players who were employed by the Indians in 1986 and fifteen players employed by the plaintiff in 1987[1] The money for these payments came from a fund created pursuant to a settlement between the Union and twenty-six Major League Baseball Clubs after an initial arbitration decision finding that the Clubs had violated the collective bargaining agreement between them.[2]

The Indians share of the settlement fund (which totaled $280 million) was $610,00.00 for the 1986 season and $1,457,848.00 for the 1987 season. The Indians received its share of the fund in 1994 and proceeded to disburse those funds to its effected [sic] players in that same year. Because it was unsure of the tax treatment to be afforded these funds, the Indians paid FICA and FUTA taxes on the total funds disbursed as if the funds represented wages paid for services rendered *and* paid those taxes premised upon the tax obligation which

---

[1] Of these fifteen, one was not actually employed by the Indians in 1987. Because he was no longer in baseball in 1994, he was "deemed" an employee of the last team to employ him-the Indians.

[2] Specifically, the arbitration panel found that the Clubs breached Article XVIII(H) of the bargaining agreement, which prohibits the Clubs from taking concerted action to interfere with the free agency rights of their players. The arbitrators concluded that the Clubs violated this provision of the bargaining agreement by their conduct at the close of the 1985 and 1986 playing seasons, thereby affecting the market and artificially depressing salaries of would-be free agents in the subsequent seasons.

would have been applicable in the year in which the funds were actually received by the players, 1994. The Indians subsequently filed this action seeking reimbursement of all sums paid to the United States.

II.

The Indians initially contended that it was entitled to a full refund for the following reasons:

> 1. A portion of the funds paid to the Indians and disbursed to its former players ($629,000.00) constituted non-taxable interest;
>
> 2. The remaining portion of the funds (approximately $2,000,000.00) were non-taxable payments because they represented damages for a wrongful breach of the bargaining agreement, not wages for services performed; and
>
> 3. Even if the payments constituted wages for services rendered (and not interest or damages), they should have been taxed at the 1986 and 1987 tax rate, respectively, requiring reimbursement of all payments, because the FICA and FUTA obligations of the effected [sic] players had been satisfied previously for those tax years.

The government initially disputed all three points, arguing that the payments were all for wages and that FICA and FUTA taxes must be paid in the year in which wages actually are received, not the year in which they were earned or came due.

The parties eventually settled two of their disputes, though not the primary one. Thus, the parties agreed that $629,000.00 of the payments made by the Indians

out of the settlement fund constituted interest payments to which FICA and FUTA were inapplicable, requiring a reimbursement of at least $13,071.10 of the taxes paid in 1994. The parties also agreed that all remaining sums *did* constitute back-pay wage payments, reflecting monies that would have been earned in 1986 and/or 1987 but for the Clubs' joint breach of the bargaining agreement. The remaining issue, on which the parties continue to disagree, is the question of to which tax year those wages are attributable for FICA and FUTA purposes.

Interestingly, however, this remaining area of dispute is really a disagreement over what the law ought to be; the parties do not seriously dispute what the law is-at least in this Circuit. Thus, the Indians cite to and rely upon the Sixth Circuit's decision in *Bowman v. United States*, 824 F.2d 528 (6th Cir.1987) (Merritt, Martin and Brown), where the panel unanimously concluded that, "[A] settlement for back wages should not be allocated to the period when the employer finally pays but 'should be allocated to the periods when the regular wages were not paid as usual.'" *Id.* At 530, quoting *Social Security Bd. v. Neirotko*, 327 U.S. 358, 370 (1946). Based on this authority, which the Indians contend is eminently sound, the Indians assert that this Court has no choice but to (1) follow *Bowman*, (2) allocate the wages paid in 1994 to 1986 and 1987-years in which the maximum FICA and FUTA taxes had already been paid, and (3) enter judgment in the Indians favor for a full refund of all taxes paid in connection with the disbursement of settlement funds in 1994.

The government's response to *Bowman* is pointedly honest. The government concedes that *Bowman* is fac-

tually "indistinguishable from this case" and that, "under the facts in this case, the Court appears bound to follow the decision in *Bowman*." (Gov't Brief at 4-5). The government contends, however, that the *Bowman* decision was wrongly decided" and that, presumably, it will be able to convince the Sixth Circuit of that fact on appeal. Thus, the government explains in detail in its brief to this Court why it believes Congress intended FICA and FUTA obligations to apply in, or, in the language of *Bowman*, to be allocated to, the tax years in which wages actually are disbursed by the employer. The government notes that it must engage in this exercise, despite its earlier concessions regarding this Court's apparent lack of options in the face of *Bowman*, "to preserve the record for appeal." (Gov't. Brief at 5).

Apparently not fully content with the prospect of an appeal from the record as it stands, moreover, the government goes on to ask this Court to "consider" its arguments regarding the wisdom of *Bowman* and "issue a decision which reflects what this Court would do if it were given the privilege of a clean slate upon which to draw its decision." (Gov't. Brief at 5). While this Court, of course, has considered all of the government's arguments, and has examined all authority cited by both parties, it is disinclined to issue what is essentially an advisory opinion, particularly in the face of a clear, unanimous directive from a distinguished Sixth Circuit panel.

Accordingly, this Court will follow the course proposed by the Indians and dictated by *Bowman*. The government will be free on appeal to point out that many of the arguments presented here were not (apparently) presented to the *Bowman* panel and that at

least one court has disagreed with *Bowman* since that decision was issued, instead applying the allocation the government urges here. Judgment will be entered in favor of the Indians and the United States ordered to refund the $97,202.20 in FICA and FUTA taxes paid in connection with the 1994 settlement disbursements, plus interest from the dates on which such payments were made, at the rate dictated by Internal Revenue Code Sections 6621 and 6622.[3]

IT IS SO ORDERED.

/s/ KATHLEEN M. O'MALLEY
KATHLEEN M. O'MALLEY
United States District Judge

[3] This total encompasses both the taxes paid on the interest portion of the disbursements and the taxes paid on the back-pay or wage portion thereof.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:96-CV-2240

CLEVELAND INDIANS BASEBALL CO., PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: Jan. 25, 1999]

ORDER

For the reasons set forth in the Memorandum and Opinion issued in conjunction with this Order, judgment is hereby entered in favor of plaintiff, the Cleveland Indians Baseball Company, and against defendant, the United States of America for refunds of (1) FICA taxes in the amount of $96,250.20, plus interest from April 30, 1994 at the rate dictated by I.R.C. §§ 6621 and 6622 and (2) $952.00 in FUTA taxes, plus interest from January 31, 1995 at the rate fixed by I.R.C. §§ 6621 and 6622.

Based on this judgment, the case is hereby dismissed.

IT IS SO ORDERED.

/s/ KATHLEEN M. O'MALLEY
KATHLEEN M. O'MALLEY
United States District Judge

APPENDIX D

1. 26 U.S.C. 3101 provides in relevant part:

(a) Old-age, survivors, and disability insurance.

In addition to other taxes, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b))—

In cases of wages received during:	The rate shall be:
1984, 1985, 1986, or 1987	5.7 percent
1988 or 1989	6.06 percent
1990 or thereafter	6.2 percent.

(b) Hospital insurance.

In addition to the tax imposed by the preceding subsection, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b))—

(1) with respect to wages received during the calendar years 1974 through 1977, the rate shall be 0.90 percent;

(2) with respect to wages received during the calendar year 1978, the rate shall be 1.00 percent;

(3) with respect to wages received during the calendar years 1979 and 1980, the rate shall be 1.05 percent;

(4) with respect to wages received during the calendar years 1981 through 1984, the rate shall be 1.30 percent;

(5) with respect to wages received during the calendar year 1985, the rate shall be 1.35 percent; and

(6) with respect to wages received after December 31, 1985, the rate shall be 1.45 percent.

* * * * *

2. 26 U.S.C. 3111 provides in relevant part:

(a) Old-age, survivors, and disability insurance.

In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 3121(a)) paid by him with respect to employment (as defined in section 3121(b))—

In cases of wages received during:	The rate shall be:
1984, 1985, 1986, or 1987	5.7 percent
1988 or 1989	6.06 percent
1990 or thereafter	6.2 percent.

(b) Hospital insurance.

In addition to the tax imposed by the preceding subsection, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 3121(a)) paid by him with respect to employment (as defined in section 3121(b))—

(1) with respect to wages paid during the calendar years 1974 through 1977, the rate shall be 0.90 percent;

(2) with respect to wages paid during the calendar year 1978, the rate shall be 1.00 percent;

(3) with respect to wages paid during the calendar years 1979 and 1980, the rate shall be 1.05 percent;

(4) with respect to wages paid during the calendar years 1981 through 1984, the rate shall be 1.30 percent;

(5) with respect to wages paid during the calendar year 1985, the rate shall be 1.35 percent; and

(6) with respect to wages paid after December 31, 1985, the rate shall be 1.45 percent.

* * * * *

3. 26 U.S.C. 3121 provides in relevant part:

(a) Wages.

For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash; except that such term shall not include—

(1) in the case of the taxes imposed by sections 3101(a) and 3111(a) that part of the remuneration which, after remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) equal to the contribution and benefit base (as determined under section 230 of the Social Security Act) with respect to employment has been paid to an individual by an employer during the calendar year with respect to which such contribution and benefit base is effective, is paid to such individual by such employer during such calendar year. If an employer (hereinafter referred to as successor employer) during any calendar year acquires substantially all the property used in a trade or business of another employer (hereinafter referred to as a predecessor), or used in a separate unit of a trade or business of a predecessor, and immediately after the acquisition employs in his trade or business an individual who immediately prior to the acquisition was employed in the trade or business of such predecessor, then, for the purpose of determining whether the successor employer has paid remuneration (other than remuneration

referred to in the succeeding paragraphs of this subsection) with respect to employment equal to the contribution and benefit base (as determined under section 230 of the Social Security Act) to such individual during such calendar year, any remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) with respect to employment paid (or considered under this paragraph as having been paid) to such individual by such predecessor during such calendar year and prior to such acquisition shall be considered as having been paid by such successor employer;

* * * * *

4. 26 U.S.C. 3301 (1994 & Supp. IV 1998) provides:

There is hereby imposed on every employer (as defined in section 3306(a)) for each calendar year an excise tax, with respect to having individuals in his employ, equal to—

(1) 6.2 percent in the case of calendar years 1988 through 2007; or

(2) 6.0 percent in the case of calendar year 2008 and each calendar year thereafter;

of the total wages (as defined in section 3306(b)) paid by him during the calendar year with respect to employment (as defined in section 3306(c)).

5. 26 U.S.C. 3306 provides in relevant part:

* * * * *

(b) Wages.

For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash; except that such term shall not include—

(1) that part of the remuneration which, after remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) equal to $7,000 with respect to employment has been paid to an individual by an employer during any calendar year, is paid to such individual by such employer during such calendar year.

* * * * *

6. 26 C.F.R. 31.3101-2 provides in relevant part:

* * * * *

(c) *Computation of employee tax.* The employee tax is computed by applying to the wages received by the employee the rate in effect at the time such wages are received.

Example. In 1972, employee A performed for employer X services which constituted employment (see § 31.3121(b)-2). In 1973 A receives from X $1,000 as remuneration for such services. The tax is payable at the 5.85 percent rate (4.85 percent plus 1.0 percent) in effect for the calendar year 1973 (the year in which the wages are received) and not at the 5.2 percent rate which was in effect for the calendar year 1972 (the year in which the services were performed).

7. 26 C.F.R. 31.3101-3 provides:

The employee tax attaches at the time that the wages are received by the employee. For provisions relating to the time of such receipt, see § 31.3121(a)-2.

8. 26 C.F.R. 31.3111-2 provides in relevant part:

* * * * *

(c) *Computation of employer tax.* The employer tax is computed by applying to the wages paid by the employer the rate in effect at the time such wages are paid.

9. 26 C.F.R. 31.3111-3 provides:

The employer tax attaches at the time that the wages are paid by the employer. For provisions relating to the time of such payment, see § 31.3121(a)-2.

10. 26 C.F.R. 31.3121(a)-2 provides in relevant part:

* * * * *

(a) In general, wages are received by an employee at the time that they are paid by the employer to the employee. Wages are paid by an employer at the time that they are actually or constructively paid unless under paragraph (c) of this section they are deemed to be subsequently paid. For provisions relating to the time when tips received by an employee are deemed paid to the employee, see § 31.3121(q)-1.

(b) Wages are constructively paid when they are credited to the account of or set apart for an employee so that they may be drawn upon by him at anytime although not then actually reduced to possession. To constitute payment in such a case the wages must be credited to or set apart for the employee without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made, and must be made available to him so that they may be drawn upon at any time, and their payment brought within his own control and disposition. For provisions relating to the treatment of deductions from remuneration as payments of remuneration, see § 31.3123-1.

* * * * *

11. 26 C.F.R. 31.3121(a)(1)-1(a)(2) provides:

> The annual wage limitation applies only if the remuneration received during any 1 calendar year by an employee from the same employer for employment performed after 1936 exceeds the amount of such limitation. The limitation in such case relates to the amount of remuneration received during any 1 calendar year for employment after 1936 and not to the amount of remuneration for employment performed in any 1 calendar year.

* * * * *

12. 26 C.F.R. 31.3301-2 provides:

> The tax for any calendar year is measured by the amount of wages paid by the employer during such year with respect to employment after December 31, 1938. (See §31.3306(b)-1, relating to wages, and §§31.3306(c)-1 to 31.3306(c)-3, inclusive, relating to employment.)

13. 26 C.F.R. 31.3306(b)(1)-1 provides in relevant part:

> (a) *In general.* (1) the term "wages" does not include that part of the remuneration paid within any calendar year by an employer to an employee which exceeds the first $3,000 of remuneration (exclusive of remuneration excepted from wages in accordance with paragraph (j) of §31.3306(b)-1 or §§31.3306(b)(2)-1 to 31.3306(b)(8)-1, inclusive), paid within such calendar year by such employer to such employee for employment performed for him at any time after 1938.
>
> (2) The $3,000 limitation applies only if the remuneration paid during any one calendar year by an

> employer to the same employee for employment performed after 1938 exceeds $3,000. The limitation in such case relates to the amount of remuneration paid during any one calendar year for employment after 1938 and not to the amount of remuneration for employment performed in any one calendar year.
>
> *Example.* Employer B, in 1955, pays employee A $2,500 on account of $3,000 due him for employment performed in 1955. In 1956 employer B pays employee A the balance of $500 due him for employment performed in the prior year (1955), and thereafter in 1956 also pays A $3,000 for employment performed in 1956. The $2,500 paid in 1955 is subject to tax in 1955. The balance of $500 paid in 1956 for employment during 1955 is subject to tax in 1956, as is also the first $2,500 paid of the $3,000 for employment during 1956 (this $500 for 1955 employment added to the first $2,500 paid for 1956 employment constitutes the maximum wages subject to the tax which could be paid in 1956 by B to A). The final $500 paid by B to A in 1956 is not included as wages and is not subject to the tax.

* * * * *